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No. 15-458

In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The question presented in this case concerns the authority of federal courts, which has been understood since the Founding to be granted and delimited by the Constitution, statutes, and rules. This Court has recognized a narrow class of powers not specifically granted to federal courts that are nevertheless implied under Article III of the Constitution because they are necessary to the exercise of other judicial powers. The Court has established a strict test for determining whether claimed powers are inherent in federal courts and has shown restraint in recognizing such powers.

Respondent does not claim that the power to recall discharged jurors for further service in a case is expressly granted to federal courts. Instead, he claims that federal courts have inherent authority to recall discharged jurors. In so doing, however, respondent casts off the requirements this Court has traditionally used to identify inherent powers. His tactic is understandable: the claimed power conflicts with the federal rules of procedure, does not have a long unquestioned history, and is not necessary to the exercise of a court's other powers. In place of the Court's preexisting test, respondent relies on two principles: (1) that courts have inherent power to undo whatever they have the power to do, and (2) that courts have inherent power to use any procedure that would enhance efficiency. That approach would vastly expand the self-appointed powers of federal courts.

Perhaps recognizing the weakness of his merits arguments, respondent suggests that the Court should not address the question presented because petitioner has forfeited his claim that the recall of discharged jurors is impermissible. But petitioner has preserved that claim at every stage, in language so plain it is remarkable respondent would suggest otherwise. The Court should reject respondent's last-ditch effort to save his victory below. Because a federal court does not have the authority to recall discharged jurors, the judgment of the court of appeals should be reversed.

A. Petitioner Has Not Forfeited Any Aspect Of His Claim That The Recall Of Discharged Jurors Is Impermissible

In an effort to convince this Court "not [to] consider[]" petitioner's merits arguments, respondent asserts that petitioner "never made" those arguments in any forum. Br. 11, 16. That assertion is wholly without merit. Petitioner has consistently claimed that the recall of dis-

charged jurors is impermissible, and made materially the same arguments in support of that claim that he does now.

1. Start with the court of appeals. In the very first paragraph of the summary of argument in his opening brief, petitioner asserted that "the district court was without authority to recall the jury." Pet. C.A. Br. 12. Petitioner noted that "[t]he district court's conduct of the jury is a matter of procedure and the federal rules of procedure control." *Id.* at 13. Petitioner argued that the recall of discharged jurors was an "unlawful procedure," *id.* at 15, and that the jury "lost its authority to decide the case anew" after discharge, Pet. C.A. Reply Br. 8. As petitioner explained, "once a jury has been discharged * * * [it] cease[s] to be a public body and can take no further collective action." Pet. C.A. Supp. Br. 1.

Having asserted below that petitioner was making "no argument [that the district court] acted in a manner inconsistent with due process," Resp. C.A. Br. 27, respondent now argues that that was petitioner's *only* claim. See Br. 12-13. But the court of appeals plainly did not think that it was deciding a constitutional question; it framed the question simply as whether a court "may recall a jury." Pet. App. 12a. The court of appeals acknowledged petitioner's argument that "a jury is no longer an entity after the court discharges it," *id.* at 6a, but it ultimately rejected that argument based on "considerations of fairness and economy," *id.* at 11a.

2. Petitioner's approach on appeal tracked his approach in the district court. Petitioner's counsel argued that "the discharge of the jury * * * is an issue that I think can't be cured." Pet. App. 35a. He explained that, "once [the jurors] [ha]ve been released," it is improper either to "recall them" or to "ask them to amend" their verdict. *Id.* at 27a, 35a.

Petitioner's counsel did *also* express a concern about whether petitioner could "get a fair and impartial verdict at this point given what [the jury has] done." Pet. App. 26a. And no wonder: by returning a verdict of $0 in the face of stipulated damages of $10,136, the jury had engaged in an act of nullification, and its ability to render an impartial verdict in petitioner's case was thus highly questionable. See *ibid.* But that was never petitioner's *only* claim.

3. Respondent's belligerent assertion that petitioner has engaged in a "bait-and-switch" before this Court, Br. 16, is utterly unfounded.

Respondent contends that, "[t]hroughout the certiorari stage, [petitioner] characterized the question presented as one of federal constitutional law." Br. 15. The certiorari-stage briefs refute that contention. The question presented does not mention the Constitution; it simply asks whether "[a] judge may recall [discharged] jurors for further service," which comfortably encompasses the argument that a judge lacks the *authority* to do so. Pet. i. In describing the conflict among the federal courts of appeals, petitioner nowhere refers to any constitutional question. See Pet. 8-13, 15. And to the extent petitioner noted a similar division of authority among state courts, he made clear it was relevant because it illustrated the recurrence of the question presented and because "federal courts routinely discuss the reasoning of state-court decisions" in addressing that question. Pet. Reply 9-10.

Insofar as petitioner referred to federal constitutional rights in his petition for certiorari, he did so in almost exactly the same words as he later did in his opening merits brief, pointing out that jury recall "*implicates* the fundamental guarantee of a fair trial in a fair tribunal, as embodied in the specific constitutional rights to a jury

trial as well as the broader right to due process." Pet. Br. 35 (emphasis added; internal quotation marks omitted); see Pet. 16. On that point, petitioner and respondent actually agree. See Resp. Br. 24. For present purposes, however, the takeaway is that petitioner did not advance a freestanding constitutional question.

Respondent's "new" counsel claims "surprise" at petitioner's argument that a federal court lacks the authority, under the federal rules of procedure, to recall discharged jurors. See Br. 15. If so, respondent's new counsel must not have talked with his old counsel. In his brief in opposition, respondent argued that "the question presented does not raise a [c]onstitutional issue," Br. in Opp. 18, but instead "is one of federal procedure," *id.* at 17. Respondent added that such questions "are controlled by federal procedural law," citing (oddly) Federal Rule of Civil Procedure 49(b). *Ibid.*

Respondent's spurious claims of forfeiture debase the preservation rules and distract from the merits of the important question presented here. We turn now to that question.

B. A Federal Court Lacks Inherent Authority To Recall Discharged Jurors

Respondent does not argue that the federal rules give a district court express authority to recall discharged jurors for further service in a case. Instead, respondent, joined by the government, relies entirely on the inherent authority of the federal courts. See Resp. Br. 17-42; U.S. Br. 8-32.

Respondent skirts, and the government blatantly ignores, this Court's repeated admonition that the inherent authority of federal courts under Article III of the Constitution "must be delimited with care" because of the "danger of overreaching when one branch of the

Government * * * undertakes to define its own authority." *Degen* v. *United States*, 517 U.S. 820, 823 (1996). Instead, respondent seeks to redefine the strict requirements for inherent authority almost out of existence. Respondent would replace the "necessity" requirement with a watered-down "reasonableness" standard. He would deem efficiency to be a sufficient justification for inherent authority, even where the rules already provide a concededly adequate remedy for the claimed error. And he would assess inherent authority at an impossibly high degree of generality, thereby ensuring that any limitations on it would rarely if ever be transgressed.

This Court should not sanction such a dramatic loosening of the standards for inherent authority. Under the existing standards, no inherent authority to recall discharged jurors can be found.

1. Respondent contends that a federal court has inherent authority to recall discharged jurors simply because the federal rules of procedure do not expressly prohibit it. See Br. 25-30. That is not the standard this Court has adopted. Claimed inherent powers cannot "circumvent or conflict with" the federal rules, and the Court has rejected claimed inherent powers that do so. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996).

a. Under respondent's claimed inherent power, it is as if the federal rules provide that "the court may recall the jury at any time after the jury is discharged." But Civil Rule 51(b)(3) provides that "[the court] may instruct the jury at any time before the jury is discharged." Permitting a district court to recall jurors after discharge for the purpose of further instructing them and ordering them to deliberate anew would "effectively annul[]" the "before * * * discharge[]" limit in Rule

51(b)(3) by reading it out of the rule entirely. *Carlisle*, 517 U.S. at 426.

In that respect, this case is more egregious than *Carlisle*, which involved the time limit for filing a motion for judgment of acquittal under Criminal Rule 29(c). Respondent attempts to distinguish *Carlisle* on the ground that another rule prohibited courts from extending that time limit. See Br. 29. But the Court also considered whether a federal court possessed inherent authority to enter a judgment of acquittal *sua sponte* outside the time limit—a question as to which both rules, which spoke only to *motions* for acquittal, were silent. See 517 U.S. at 426. The Court concluded that recognizing such a power would "effectively annul[]" the rule. *Ibid.* Here, Rule 51(b)(3) imposes a limitation directly on district courts; the Court cannot recognize an inherent power to disregard that limitation.

Respondent argues that Rule 51(b)(3) authorizes courts to instruct juries before discharge but does not affirmatively deny courts the power to instruct juries after discharge. See Br. 27. In *Carlisle*, however, this Court rejected a materially identical argument about a similarly "permissive" rule. See 517 U.S. at 431-432. Respondent also contends that recalling jurors after discharge for further instruction would not contravene the "before * * * discharge[]" limit, because the court has "undo[ne]" the discharge and any further instruction would occur before the jury is discharged again. See Br. 27. At a minimum, however, such an artifice "circumvent[s]" the rule and thus is beyond the scope of a court's inherent authority. See *Carlisle*, 517 U.S. at 426.

Respondent observes that the "before * * * discharge[]" limit was recently added to Rule 51(b)(3) and, quoting an advisory committee note, asserts that the modification was intended to reflect a supposed "com-

mon practice" favoring jury recall. See Br. 28. But that quotation is selective. In fact, the note states that Rule 51(b)(3) "reflects common practice by authorizing instructions at any time after trial begins and *before the jury is discharged.*" Fed. R. Civ. P. 51 advisory committee's note (2003) (emphasis added). The note thus confirms that the "common practice" was to instruct juries only before they are discharged, not after.

b. Respondent makes little effort to confront the other rules that demonstrate the absence of any authority to recall discharged jurors. For example, in the case of a bench trial, Civil Rule 59 permits a court to respond to a motion for a new trial by effectively continuing the previous trial. In the case of a jury trial, however, no such continuation of the first trial, by recall of the jurors or otherwise, is authorized; the rule permits only a new trial.

Respondent's only explanation for this difference is that a new trial is a different remedy from jury recall. See Br. 29. But that misses the point: the former remedy is authorized by the rules, and the latter is not. The fact that the rules provide for further proceedings in a bench trial, but not in analogous circumstances in a jury trial, demonstrates that the absence of an affirmative authorization for jury recall was no mere oversight.

2. Respondent suggests that this Court could recognize an inherent power even in the absence of a long history of courts exercising that power. See Br. 30-38. Respondent is wrong both on the law of inherent authority and on the history of jury recall.

a. As petitioner has explained, this Court has required parties claiming an inherent power to show that exercise of that power has a "long unquestioned" history. *Carlisle*, 517 U.S. at 426, 427 n.5, 431. Indeed, this Court has never recognized an inherent power without such a

history. The cases on which respondent relies are not to the contrary, because they either identified such a history or did not involve a pure question of inherent authority. See *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980); *Thomas* v. *Arn*, 474 U.S. 140, 145 (1985).

b. Respondent correctly conceded below that "[i]t has long been the general rule that a jury could not be recalled to amend its verdict after being discharged and separating." Resp. C.A. Br. 23. In arguing otherwise to this Court, respondent seriously mischaracterizes the state of the law.

i. In many of the cases respondent cites (and in many of the cases respondent wrongly accuses petitioner of "falsely" describing, Br. 32), the courts took a functional view of "discharge," permitting recall only up to the point at which the jurors left the judge's presence and control. See *Brister* v. *State*, 26 Ala. 107, 132 (1855); *Levells* v. *State*, 32 Ark. 585, 590-591 (1877); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw.), cert. denied, 134 S. Ct. 2826 (2014); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S&R, Inc.*, 639 A.2d 660, 665-667 (Md. 1994); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983).

For example, in *Summers* v. *United States*, 11 F.2d 583 (4th Cir.), cert. denied, 271 U.S. 681, 586 (1926), the court laid out the "general rule" that, after the jury has been "discharged [and] ha[s] separated, the jury cannot be recalled to amend their verdict." At the same time, the court recognized that a jury may remain effectively undischarged despite a judge's pronouncement of discharge, if it remains within the court's control. *Ibid.* The adoption of a functional view of "discharge" does not demonstrate authority for a court to recall discharged jurors; instead, it merely confirms that a court's authority over the jury ends at the point of discharge, however

that point is defined. And there is no dispute that the jury was discharged here. See Pet. Br. 31 n.6.

In many of the other cases respondent cites, the jury was not reassembled for the purpose of further deliberations. See *Ira Green, Inc.* v. *Military Sales & Service Co.*, 775 F.3d 12, 26 (1st Cir. 2014); *United States* v. *Rojas*, 617 F.3d 669, 678 (2d Cir. 2010); *United States* v. *Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994); *Mitchell* v. *State*, 22 Ga. 211, 236 (1857); *Taggart* v. *Commonwealth*, 46 S.W. 674, 675 (1898); *Lapham* v. *Eastern Massachusetts Street Railway Co.*, 179 N.E.2d 589, 593 (Mass. 1962); *Cole* v. *Laws*, 10 S.E. 172, 174 (N.C. 1889); *State* v. *Rodriguez*, 134 P.3d 737, 739-741 (N.M. 2006); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1052-1053 (R.I. 1990); *State* v. *Roberge*, 582 A.2d 142, 144-145 (Vt. 1990).

For example, in the earliest federal case respondent identifies, *Burlingame* v. *Central Railroad*, 23 F. 706 (C.C.E.D.N.Y. 1885), the judge had recalled the jurors to determine whether the recorded award of $3,500 to the plaintiff was the verdict the jury had intended. *Ibid.* Based on testimony from the foreman and an affidavit from the jurors, the judge determined that the jury had intended to award interest and corrected the verdict. *Ibid.* The appellate court recognized "[t]he power of the court to cause the verdict to be corrected." *Id.* at 707. But it did not address the authority of a court to recall jurors for the purpose of deliberating anew and reaching an entirely different verdict. As petitioner has noted, a judge has long possessed the authority to correct a mistake in the reported verdict, but not to reassemble the jury for further deliberations after a *correctly* reported verdict. See Pet. Br. 27.

The few remaining cases respondent cites (most of which are relatively recent) simply demonstrate the ex-

istence of the conflict of authority that triggered this Court's review. Obviously, the mere existence of *some* lower-court authority is insufficient to demonstrate a "long unquestioned" history of courts exercising an inherent power. Were it otherwise, the inquiry would by definition end in virtually every inherent-authority case in which the Court grants certiorari.

ii. As to the authorities cited by petitioner, respondent does not dispute that the established rule in England before the Founding, and in the United States shortly thereafter, forbade the recall of discharged jurors. Instead, respondent attempts to dismiss the early authorities as "irrelevant or outdated." Br. 35. But those authorities are significant precisely because of their dates: they establish that there is no long unquestioned history of courts recalling discharged jurors. See Pet. Br. 25-26 (citing cases).

Respondent contends that some of those authorities "lack reasoning" or rest on "concerns about juror impartiality." Br. 32. Again, that misses the point: whatever the reason, courts at the time of the Founding did not consider themselves able to recall discharged jurors. And respondent's contention gives the lie to the government's (unfounded) contention that the long line of early authorities rested on a supposedly "technical" rule unrelated to concerns about the fairness of proceedings. See U.S. Br. 28.

Respondent ultimately concedes, as he must, that early courts prohibited the recall of discharged jurors, but he attempts to link that rule with the rule of sequestering jurors. See Br. 34-35. It simply does not follow from elimination of the requirement of jury sequestration, however, that district courts now have the affirmative authority to recall discharged jurors for further service. It is one thing for a court not to exercise its power

to sequester jurors who are deliberating and still under instructions; it is quite another to permit a court to recall jurors when they have separated after discharge and have been *released* from their instructions. And as respondent acknowledges, the requirement of sequestration "persisted well into the twentieth century," Br. 34; its recent abandonment could scarcely give rise to a "long unquestioned" power to recall discharged jurors.

3. Respondent would cast off the venerable requirement that an inherent power be "necessary to the exercise of" a federal court's other powers, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). See Br. 38-40. Respondent instead relies on a single sentence from this Court's decision in *Degen* requiring that the exercise of an inherent power be a "reasonable response to the problems and needs that provoke it," 517 U.S. at 823-824—ignoring the Court's subsequent statement that an inherent power must be sufficiently "limited by the necessity giving rise to its exercise," *id.* at 829, and its holding that the claimed inherent power was invalid because "[t]here was no necessity to justify" it, *ibid.*

This Court has never recognized an inherent power apart from those essential to the functioning of a court and the enforcement of its decrees. Respondent relies on *Chambers* for the proposition that "necessary" merely means "useful." See Br. 38. But the Court has never adopted that meaning. To the contrary, in the statement respondent quotes from *Chambers*, the Court was merely reciting a party's argument, which it did not adopt. See 501 U.S. at 47 n.12. In fact, the Court recognized in *Chambers* that an inherent power to sanction the bad-faith conduct at issue was necessary because "[m]uch of the bad-faith conduct * * * was beyond the reach of

the [federal] [r]ules," yet could not be tolerated by a court. *Id.* at 50-51. The Court has steadfastly adhered to the principle that tethering inherent powers to necessity (and history) serves as an important check on the judiciary in defining the scope of its own authority. See *Degen*, 517 U.S. at 823.

b. The claimed power to recall discharged jurors is unnecessary because the existing rules provide concededly adequate procedures for remedying an invalid or ambiguous verdict after the jury has been discharged. The remedy for an invalid verdict is a new trial, see Fed. R. Civ. P 59, and the remedy for an error in recording the verdict is a streamlined proceeding to correct it, see Fed. R. Civ. P 60(a). While respondent erroneously contends that it is the view of Justice Kennedy alone, see Br. 39, the entire Court agreed in *Degen* that "[t]he existence of * * * alternative means of protecting the [relevant] interests * * * shows the lack of necessity" for an inherent power. 517 U.S. at 827.

According to respondent, the only respect in which jury recall is superior to the primary existing remedy for an invalid verdict—a new trial—is expediency. See Br. 39. While respondent adds that recall is "just" and "narrowly tailored," he does not dispute that the same is true of a new trial, which justly and precisely remedies an invalid verdict. *Ibid.* A new trial may be less efficient, but that is not enough to give rise to inherent authority—as respondent concedes. See *ibid.*

If respondent truly wanted to avoid any inefficiency associated with a new trial, moreover, he could have invoked another remedy: objecting to the invalid verdict while the jury remained empaneled and affording the judge the option of reinstructing the jury for further deliberations. At the time of the jury's verdict, respondent's counsel knew full well that the verdict was invalid,

because he had just argued to the jury that it had an "obligation under the law" to award petitioner at least $10,136. 4/17/13 Tr. 242. If respondent's counsel wanted to save the verdict from invalidation (and to have a jury obviously sympathetic to his client, rather than a new jury, conduct further deliberations), he could have spoken up. But when the jury returned its verdict, what did counsel say? Nothing. See Pet. App. 25a. Given the available alternatives, it is entirely unnecessary to recognize an inherent authority to recall jurors after discharge.

4. Unable to satisfy this Court's strict requirements for inherent authority, respondent resorts to analogy. Specifically, respondent contends that courts have inherent authority to correct errors, manage their dockets, and rescind interlocutory orders before final judgment—and that, in combination, those generic "powers" beget an inherent power to recall discharged jurors. See Br. 18-22.

As a preliminary matter, inherent authority should not be considered at such a high level of generality, with the result that a court need only claim vague authority to "correct errors" in order to arrogate power unto itself. When this Court has assessed claims to inherent authority, it has defined the asserted inherent power with specificity. See, *e.g.*, *Degen*, 517 U.S. at 823; *Carlisle*, 517 U.S. at 426; *Chambers*, 501 U.S. at 42.

In any event, respondent's argument fails because the general principles he identifies are not absolute. In *Carlisle*, this Court rejected a claim of inherent authority to grant a motion for judgment of acquittal filed one day late, even though the district court had found that the failure to grant relief would result in "grave injustice." 517 U.S. at 419. That refutes respondent's assertion that a district court has unlimited authority to cor-

rect errors (and to manage its docket) as long as it retains jurisdiction over a case.

It is equally fanciful to suggest that a district court has absolute authority to rescind interlocutory orders before final judgment. To be sure, the federal rules contain a broad grant of such authority. See Fed. R. Civ. P 54(b). But it is well established that a federal court lacks the authority to correct various types of orders even before final judgment. For example, once a court orders a change of venue and transfers the case files, it has no power to rescind that order. See, *e.g.*, *Miller* v. *Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009). A judge who recuses himself from a case may not reconsider his order after the case has been transferred to another judge. See, *e.g.*, *El Fenix de Puerto Rico* v. *M/Y Johanny*, 36 F.3d 136, 141 (1st Cir. 1994). And a court that enters a final judgment dismissing certain claims or parties to allow an appeal relinquishes jurisdiction over those claims or parties, even if it retains jurisdiction over the remainder of the case. See Fed. R. Civ. P. 54(b); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). An order discharging a jury is like the foregoing types of orders: it is "final" in the relevant sense, because discharge relieves the jury of its authority over the case. Such an order is an unalterable relinquishment of authority and is not subject to modification.

Finally on this score, the specific inherent powers that respondent and the government identify are irrelevant here. The powers to issue stays and to make evidentiary rulings *in limine* may serve a court's interest in structuring its own proceedings while a case is pending, but they say nothing about a court's power—after a jury completes its task, returns its verdict, and is discharged—to provide an additional remedy beyond those already provided by the federal rules. Similarly, an ap-

pellate court may have the power to recall its mandate in cases involving "grave, unforeseen contingencies," *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998), but that hardly indicates that a district court possesses inherent authority to recall jurors for further deliberations after the jury returns an invalid verdict—a situation that is both eminently foreseeable and already covered by existing remedies.

Respondent's efforts to circumvent this Court's strict requirements for inherent authority by resort to analogy are unavailing. Because none of those requirements is satisfied here, the district court lacked the authority to recall the discharged jurors.

C. Upon Discharge, A Juror Returns To Being An Ordinary Citizen

Respondent contends that it is "circular" to argue that a court lacks authority over jurors once they have been discharged. See Br. 40-42. That contention lacks merit.

1. Petitioner's argument accords with the universal understanding of what it means for a jury to have been "discharged." Consistent with the ordinary meaning of the term, "discharge" marks a jury's release from service; upon discharge, jurors are relieved of their authority over the case and return to being ordinary citizens. See Pet. Br. 18-22. While respondent chastises Chief Judge Cardozo for failing to provide a citation, see Br. 41, he was merely capturing that universal understanding when he stated that, upon discharge, "[the jury] has ceased to be a jury," and its members are no longer "an arm or agency of the law." *Porret* v. *City of New York*, 169 N.E. 280, 280 (N.Y. 1929).

Respondent's approach cannot be reconciled with that understanding. Under respondent's approach, a

discharged juror would remain a "juror" under the district court's authority for an indefinite length of time. The only limits on a district court's power to recall discharged jurors would be those imposed by due process: specifically, when jurors "can no longer be impartial" or "their memories of the evidence have faded." Br. 52.

The implication of respondent's approach is that district courts possess potentially lifelong authority over former jurors. Respondent's response to the hypothetical of a former juror who refuses to agree to a court's recall is telling. See Br. 41-42. Respondent seemingly takes the view that a court could compel discharged jurors to return to service in a case, just as it could compel jurors who remain empaneled to return after a recess. Under respondent's approach, therefore, a court could hold a former juror in contempt (as it could a sitting juror) for failure to return upon the court's order, even long after the proceedings have ended. That cannot be the law.

2. Recognizing the troubling consequences of such an unbounded rule, the government contends that the power to recall discharged jurors is cabined by "discretionary" principles. Thus, the government argues, it would be presumptively improper—make that "strong[ly]" presumptively improper—for a court to recall jurors after they "have returned to their homes and daily lives" or "more than an hour after the jury was discharged" (whichever comes first?). Br. 5-6, 22. That purportedly "strong" presumption could be overcome, however, where the problem with the verdict is merely a clerical one: for example, where "the jurors would be asked only to clarify unclear handwriting in a damages amount on a verdict form." Br. 23. And in all events, a district court could not recall discharged jurors if it hap-

pens to enter final judgment immediately after the jury returns its verdict. See Br. 22.

In support of this impossibly reticulated, quasi-legislative scheme, the government contends that cases in which district courts would attempt to recall jurors "more than an hour" after discharge will be "exceptionally rare." Br. 23. But courts have attempted to recall jurors days, weeks, and even months after discharge. See, *e.g.*, *People* v. *Hendricks*, 737 P.2d 1350, 1352 (Cal. 1987) (over five months); *Drop Anchor Realty Trust* v. *Hartford Fire Insurance Co.*, 496 A.2d 339, 345 (N.H. 1985) (five days).

More broadly, if the government is serious about imposing a presumptive one-hour limit on a court's authority to recall discharged jurors, it is hard to see why a rule permitting recall is worth the candle. A judge can always double-check the verdict for obvious infirmities before discharging the jury, rather than in the hour after. Indeed, in this case, the judge's decision to discharge the jury was inexplicable, because the judge himself had recognized, less than an hour earlier, that a "verdict in less than th[e] [stipulated] amount" would be improper. J.A. 36. There is no valid justification for this Court to invent the jurisprudential equivalent of the five-second rule under the guise of inherent authority.[1]

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[1] Should this Court conclude that a federal court has inherent authority to recall discharged jurors for further service in a case, it should at a minimum establish a bright-line rule against recalling discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew to reach a different verdict. See Pet. Br. 33-41. Any interest in expediency does not outweigh the interests in fairness and finality that a rule permitting recall in those circumstances would implicate. See *ibid.*

D. The District Court's Error In Recalling The Discharged Jurors Could Not Have Been Harmless

Finally, respondent contends that, if district courts do not have authority to recall discharged jurors, the error in recalling the discharged jurors here was harmless because the district court determined that the jurors had not talked to anyone else about the case during the period of discharge. See Br. 42-44. Even assuming that the district court's prejudice inquiry was sufficient, respondent's contention fails because the error could not have been harmless.

1. The question presented is whether a federal court has the authority to recall discharged jurors for further service in a case. An action by a federal court that exceeds its Article III powers is traditionally not amenable to harmless-error analysis, because a contrary rule would sanction the exercise of authority that the court does not possess. Cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988). And just as the district court lacked the power to recall the discharged jurors, the discharged jurors lacked the power to act. It is well established that the decision of an improperly constituted tribunal is void, without regard to whether the constitution of the tribunal caused any prejudice. See Pet. Br. 36 (citing cases).

Respondent contends that, because the jury could have rendered a valid verdict if it had not been discharged, the issuance of a similar verdict after discharge must be harmless. See Br. 43. But the cases on improperly constituted tribunals belie that contention. For example, in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960), this Court vacated the decision of an en banc appellate panel, without regard to prejudice, because the panel included a retired judge who was ineligible to participate in the en banc proceed-

ings. It was of no moment that the judge had served on the original panel before retiring, or that the judge could have served on the en banc panel if he had not retired in the interim. At the time the decision was rendered, the judge was ineligible to serve on the en banc panel, and its judgment was therefore void. See *ibid.* So too here, the fact that the jury could have rendered a valid verdict before it was discharged is simply irrelevant.

2. For its part, the government advances a mutant version of a harmless-error argument. It contends that the error at issue was the "mistaken discharge"; because that error was a "technical" one, the harmless-error rule (as codified in Civil Rule 61) requires a court to choose the less "drastic" remedy of jury recall over the remedy of a new trial. Br. 15.

That argument is seriously flawed. To begin with, the error that petitioner is challenging was the decision to recall the discharged jurors—and that is therefore the only error to which harmless-error analysis could even arguably apply. And the *underlying* error that jury recall was designed to address was not the "mistaken discharge" of the jury; instead, it was the jury's invalid verdict. There is nothing erroneous about a court's decision to discharge a jury after it completes its task and returns a verdict, even if the verdict ultimately cannot stand. If the district court in this case had not recalled the jury and permitted it to reach a different verdict, petitioner would hardly have appealed the decision to discharge the jury; he would have appealed the jury's verdict (as embodied in the final judgment).

When that conceptual flaw in the government's argument is understood, the entire argument collapses. A verdict that is contrary to the weight of the evidence is hardly a "technical" error; it is the archetypal prejudicial error that justifies a new trial. See *Gasperini* v. *Center*

for Humanities, Inc., 518 U.S. 415, 433 (1996). And, of course, a new trial is precisely the remedy that the federal rules actually provide. See Fed. R. Civ. P. 59; cf. Fed. R. Civ. P. 60(a) (providing a streamlined remedy for "technical" errors in recording verdicts).

By its own admission, the government is asking this Court to recognize a new type of remedy for invalid verdicts, and a new type of post-verdict motion to coexist alongside a motion for a new trial: namely, a "mo[tion] to revoke the discharge." U.S. Br. 18. But while the harmless-error rule permits the correction of errors that do not affect substantial rights, it does not operate to endow federal courts with powers that they do not otherwise possess. If the government would like federal courts to have the power to recall discharged jurors (at least for a one-hour grace period), it should not ask this Court to recognize that power under Article III of the Constitution or through the back door of the harmless-error rule. It should instead take up the matter in the appropriate forum—the Advisory Committee on the Rules for Civil Procedure.

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Because a federal court does not have inherent authority to recall discharged jurors for further service in a case, the judgment of the court of appeals cannot stand. That judgment should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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